INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
A. The Board's findings of fact	2
B. The decisions below	8
Argument	11
Conclusion	13

CITATIONS

Cases:

Ace Doran Hauling & Rigging Co. v. *National Labor Relations Board*, 462 F. 2d 190	11, 12
Ace Doran Hauling & Rigging Co., 214 NLRB No. 84, 87 LRRM 1525	12
Conley Motor Express, Inc., 197 NLRB 624	12
Daily Express, Inc., 211 NLRB No. 19, 86 LRRM 1355	12
Fleet Transport Co., Inc., 196 NLRB 436	12
George Transfer & Rigging Co., Inc., 208 NLRB 494	12
Independent Rapid Trucking, 200 NLRB 367	12
Kreitz Motor Express, Inc., 210 NLRB 27	12
Local 814, Teamsters, 208 NLRB 184	12
Maxwell Company v. *National Labor Relations Board*, 414 F. 2d 477	13

Cases—Continued

	Page
National Labor Relations Board v. *Denton, Inc.*, 502 F. 2d 1221, certiorari denied, 422 U.S. 1047	13
National Labor Relations Board v. *United Insurance Co.*, 390 U.S. 254	11
Portage Transfer Co., Inc., 204 NLRB 787	12
Site Oil Company of Missouri v. *National Labor Relations Board*, 319 F. 2d 86	13

Statutes:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*):	
Section 2, 29 U.S.C. 152	2
Section 2(3), 29 U.S.C. 152(3)	2
Section 7, 29 U.S.C. 157	2
Section 8, 29 U.S.C. 158	2
Section 8(a)(1), 29 U.S.C. 158(a)(1)	10
Section 8(2)(5), 29 U.S.C. 158(a)(5)	10

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-726

AETNA FREIGHT LINES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 29a–34a) is reported at 520 F. 2d 928. The Board's decision and order (Pet. App. 15a–27a) are reported at 209 NLRB 850. Its decision in the related representation proceeding (Pet. App. 10a–14a) is reported at 194 NLRB 740.

JURISDICTION

The judgment of the court of appeals was entered on August 18, 1975 (Pet. App. 35a). The petition for a writ of certiorari was filed on November 17, 1975

(a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that petitioner's single-owner and nonowner drivers are employees, rather than independent contractors, under the National Labor Relations Act.

STATUTES INVOLVED

The relevant provisions of Sections 2, 7, and 8 of the National Labor Relations Act, as amended, 29 U.S.C. 152, 157, and 158, are set forth at Pet. 3.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

Petitioner, the Aetna Freight Lines, Inc., is a motor carrier engaged in the transportation of special commodities across state lines (Pet. App. 3a; J.A. 226, 227).[1] In March 1971, the Fraternal Association of Special Haulers, Local No. 100 ("the Union"), filed a representation petition with the Board seeking to represent petitioner's truck drivers. Petitioner contended that the drivers were independent contractors under Section 2(3) of the National Labor Relations Act, 29 U.S.C. 152(3), and that they therefore were not covered by the Act (Pet. App. 2a–3a). After the ensuing hearing to determine the status of the drivers,

[1] "J.A." refers to the printed appendix, and "S.A." to the supplemental appendix, filed in the court of appeals. A copy of each appendix has been filed with the Clerk of this Court.

the Board's Regional Director made the following findings.

1. Petitioner operates under a certificate of Public Convenience and Necessity granted by the Interstate Commerce Commission ("I.C.C.") and is subject to regulations promulgated by it and by the Department of Transportation (Pet. App. 3a; J.A. 115–121). In conformance with applicable federal regulations, petitioner leases approximately 617 pieces of equipment which are operated by three categories of drivers (J.A. 228–240): (a) Single-Owner Drivers, who own and drive a single truck leased to petitioner; (b) Multiple-Owner Drivers, who own and lease more than one truck to petitioner and drive one of their leased vehicles;[2] and (c) Nonowner Drivers, who drive trucks leased to petitioner by someone else.

2. Petitioner enters into an "Agreement for Hire of Motor Vehicle Equipment" with the single-owner drivers, to remain in effect no less than 30 days, after which either party may terminate the lease. The lease agreement provides, *inter alia,* that petitioner is entitled "to exclusive possession, control, and use" of the leased equipment. Petitioner is responsible to the public, the shipper, and the I.C.C. for the equipment, and under the agreement petitioner agrees to exhibit its name on each vehicle and to assign each vehicle a serial number (Pet. App. 3a–4a; J.A. 123, 235, 239, 250). I.C.C. regulations require monthly mechanical inspections of leased equipment, and petitioner further

[2] The status of these drivers is not in issue.

requires its leased equipment to be inspected by its own employees once every 20 days (Pet. App. 5a; J.A. 250–251, 222, 224).

3. Under the lease, the single-owner driver is obligated to provide fuel and lubrication, to maintain his equipment in good running order, and to meet the requirements of motor carrier regulations.[3] Petitioner may cancel the lease if the owner-driver fails to keep his equipment in the required condition or to operate the leased equipment to petitioner's satisfaction (Pet. App. 4a; J.A. 123, 234).

4. Pursuant to the agreement, single-owner drivers are fully responsible to petitioner for all damages to cargo caused by negligence (Pet. App. 4a; J.A. 194, 279), but petitioner also carries cargo and liability insurance covering all vehicles operating in its business (Pet. App. 4a–5a; J.A. 249–279). Petitioner also makes bobtail insurance available to single-owner drivers (Pet. App. 5a; J.A. 235).[4]

5. Owner-drivers are paid pursuant to a compensation schedule established by petitioner. Owners who lease both a tractor and a trailer to petitioner receive 75 percent of the gross revenue received from the

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[3] Petitioner sells the drivers gasoline, oil, safety devices, and parts. Petitioner may assist in the installation of safety equipment; it has established central pickup points for the salvage of items such as tires for resale (Pet. App. 11a–12a; J.A. 260, 262, 165, 223, 224); and it provides for free parking of equipment on its premises (Pet. App. 5a; J.A. 280). Petitioner also maintains drivers' rooms which have bulletin boards where notices and regulations are posted (J.A. 280).

[4] A tractor is considered to be running "bobtail" when a trailer is not hitched onto it.

haul. Owners who lease only a tractor to petitioner and hook it up to a trailer owned by petitioner receive 65 percent of the gross revenue (Pet. App. 5a; J.A. 230, 248, 265–266, 288, 298). Extra compensation is given as an incentive for hauling undesirable loads (Pet. App. 5a, n. 8; J.A. 233, 236), and single-owner drivers also receive hourly detention time for waiting to be loaded (Pet. App. 5a, 13a; J.A. 287). If a single-owner driver hooks up to a trailer owned by petitioner that has already been loaded and brought to the terminal, he pays a six-dollar loading fee (J.A. 295). Payments are made directly to the owner-drivers without any deductions for Federal withholding tax, social security, or unemployment or workmen's compensation; there are deductions for supply charges and advances (Pet. App. 5a–6a; J.A. 232, 260, 267–268).

6. Owner-drivers purchase their own equipment and license plates, but they may receive cash advances from petitioner to assist with these purchases (Pet. App. 4a, 12a, n. 2; J.A. 269, 262), and they can purchase trailers from petitioner (J.A. 238–239).[5] Petitioner and the owner-drivers share the cost of various taxes and other fees required by different states in amounts and percentages determined by petitioner (Pet. App. 4a, 13a; J.A. 24, n. 2, 234, 244–245, 270, 272–273, 288–289, 195; S.A. 3).

7. Before starting to work for petitioner, all drivers, including owner-drivers, are required to fill

[5] Owner-drivers also may receive cash advances to cover expenses on particular hauls (J.A. 190–198, 260, 299).

12. Petitioner gives all drivers the same Christmas gifts, and all drivers are eligible to compete for safety driving awards or bonuses and to attend safety banquets (Pet. App. 6a; J.A. 168, 248, 261, 281, 286–287). Drivers may participate in a group health, accident, and hospitalization plan organized and administered by petitioner; the cost of the plan is paid by the drivers but collected by petitioner (Pet. App. 6a, 13a; J.A. 188, 264, 289–290).

13. Petitioner maintains a system of discipline for breach of its regulations (J.A. 186, 298) and cancels leases for poor accident records,[7] delayed loads, arguments with customers, illegal trip-leasing, and bad credit (J.A. 277–278). In the case of similar infractions by a nonowner driver, petitioner issues a stop load notice on the driver and asks the owner to take disciplinary action or replace the driver. In the event an owner refuses to do so, petitioner may cancel his lease. Petitioner can reinstate nonowner drivers who have been removed (J.A. 276–279, 290, 298).

B. THE DECISIONS BELOW

1. Based upon these facts, the Board's Regional Director concluded that petitioner's single-owner drivers and nonowner drivers are employees, not independent contractors, and constitute an appropriate bargaining unit under the Act (Pet. App. 6a–8a). Applying the common law "right-of-control" test, the Regional Director acknowledged that "[t]here are, admittedly, a number of factors in this case which would appear to militate in favor of a finding that the

[7] Petitioner maintains records of all accidents (J.A. 250).

equipment owners are independent contractors," but he found that those facts were "outweighed by others which establish extensive employer control over the drivers and require the conclusion that they are employees of the Employer" (Pet. App. 6a–7a).[8]

On review, the Board found that the Regional Director had properly applied the "right-of-control" test to the facts of this case and affirmed his determination that the drivers in question are petitioner's employees (Pet. App. 10a–14a). The Board also relied upon the fact that petitioner reserved extensive powers to discipline drivers by use of "stoploads (instructions not to give such drivers loads until he corrects his errors)", the numerous services provided by petitioner to the drivers, and the "directives" issued by the petitioner in the course of the drivers' duties (Pet. App. 11a–12a, n. 2).

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[8] The Regional Director relied upon the following considerations (Pet. App. 7a):

"The overall effect of the ICC regulations requiring comprehensive employer control over the operations of the drivers and of the leased equipment; the Employer's right to the exclusive possession, control and use of the leased equipment during the term of the leases; the fact that a substantial majority of the owner-drivers haul almost exclusively for the Employer; the fact that all drivers are required to submit employment applications; the fact that the Employer can terminate at any time the lease agreements if the equipment is not maintained in good working condition or if the equipment is not operated to the satisfaction of the Employer; the right of either party to terminate the leases at will, any time after 30 days; the fact that payments made to equipment owners for hauling the Employer's freight are for the most part unilaterally set by the Employer; the fact that the leased equipment is required to exhibit the Employer's name; and the requirement that drivers submit logs and physical examination reports to the Employer."

Chairman Miller, concurring separately, added that the finding of employee status was supported, *inter alia*, by "[t]he severe restrictions on trip leasing, the use of lease terminations as discipline for failure to accept loads, the carefully prescribed time restrictions on deliveries, the detailed and uniformly applied rules regarding procedures in the event of delays and accidents, and the 'how to do it' directions covering other aspects of the driving operation * * *" (Pet. App. 13a). He also found that the "unilaterally determined allocation of expenses" and "payment of special cash and merchandise bonuses" indicated "less independence than would be present in a true independent contractor relationship" (*id.* at 13a–14a).

2. Following certification of the Union as the drivers' exclusive representative, petitioner refused to bargain; the Union filed unfair labor practice charges. In the subsequent unfair labor practice proceeding, the Board found that petitioner had violated Section 8(a)(5) and (1) of the Act by refusing to recognize or bargain with the duly certified bargaining agent of an appropriate unit of its employees (Pet. App. 15a–27a). The Board ordered petitioner to bargain collectively with the Union (Pet. App. 25a).

3. The court of appeals enforced the Board's order, concluding that "the Board properly applied the common law standards distinguishing between employees and independent contractors and that its findings that both the nonowner drivers and single-owner drivers are employees of Aetna are supported by substantial evidence" (Pet. App. 34a). The court rejected petitioner's contention that the Board's decision with re-

spect to nonowner drivers was inconsistent with the court's own decision in *Ace Doran Hauling & Rigging Co.* v. *National Labor Relations Board,* 462 F. 2d 190.

ARGUMENT

In *National Labor Relations Board* v. *United Insurance Co.,* 390 U.S. 254, 258, this Court held that, in distinguishing between employees and independent contractors for purposes of the Act, "common-law agency principles" are to be used and "all of the incidents of the [employment] relationship must be assessed and weighed with no one factor being decisive." In this case, both the Board and the court of appeals considered all aspects of the employment relationship and concluded that petitioner's single-owner and nonowner drivers were employees. Petitioner's contention that the Board erred in its conclusion raises an essentially factual issue that does not warrant review by this Court.

The cases upon which petitioner relies (Pet. 16, n. 7) for its contention that the decision here is irreconcilable with past Board decisions finding drivers to be independent contractors are factually distinguishable. In each of the prior cases, the drivers were free to accept or decline loads without penalty, according to their own assessment of the economic advantage to them in making a particular run. The drivers were not subject to rules imposed by the carrier, beyond those required by the regulations of I.C.C. and the Department of Transportation. Nor were the drivers in those other cases subject to more than minimal supervision in their day-to-day operations. Moreover, in

almost all of the cases, the drivers were permitted unrestricted trip-leasing. *Fleet Transport Co., Inc.*, 196 NLRB 436, 437, 439; *Conley Motor Express, Inc.*, 197 NLRB 624, 625, 626; *Independent Rapid Trucking*, 200 NLRB 367, 374–375; *Portage Transfer Co., Inc.*, 204 NLRB 787, 788–789; *Local 814, Teamsters*, 208 NLRB 184, 191, 192, 197; *George Transfer & Rigging Co., Inc.*, 208 NLRB 494, 495, 496; *Kreitz Motor Express, Inc.*, 210 NLRB 27, 28–29; *Daily Express, Inc.*, 211 NLRB No. 19, pp. 6, 8, 86 LRRM 1355, 1356–1357.

Here, by contrast, the Board and the court of appeals found (Pet. App. 11a–13a and n. 2, 32a–33a) that the drivers were subject to discipline and discharge for failure to accept loads, were issued directives on government safety regulations and petitioner's rules, were subject to pervasive supervision, and were severely restricted in their ability to trip-lease. Moreover, the court found that the evidence established that petitioner "exercises control over the hiring and firing of drivers engaged by the multiple owners by refusing to execute leases where drivers of the leased equipment are found unacceptable and by employing lease cancellation as a means of enforcing driver discipline and discharge" (Pet. App. 32a). On these facts, the court of appeals properly rejected petitioner's argument that the decision of the Board in this case was contrary to the Board's later decision in *Ace Doran Hauling & Rigging Co.*, 214 NLRB No. 84, 87 LRRM 1525, and to the court's own decision in *Ace Doran Hauling & Rigging Co.* v. *National Labor Relations Board*, 462 F. 2d 190.

The difference in result has nothing to do with differences in the principles of law, but merely with "the amount of control shown by the evidence" (Pet. App. 32a). "About all that the cases demonstrate is that the test for determining the status of workers is much easier to state than it is to apply, and that each case must stand or fall on its own peculiar facts." *Site Oil Company of Missouri* v. *National Labor Relations Board*, 319 F. 2d 86, 91 (C.A. 8). See also *Maxwell Company* v. *National Labor Relations Board*, 414 F. 2d 477, 481 (C.A. 6); *National Labor Relations Board* v. *Deaton, Inc.*, 502 F. 2d 1221, 1228 (C.A. 5), certiorari denied, 422 U.S. 1047. Accordingly, it is sufficient here that the proper principles of law were applied and substantial evidence supported the Board's findings and conclusion.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1976.

U.S. GOVERNMENT PRINTING OFFICE: 1976